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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 942

MARKETLINES, INC.,

Petitioner,

against

THE SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Second Circuit entered in the above entitled case.

Opinions Below

The Court of Appeals wrote an opinion, which is annexed hereto as Appendix A, *infra,* page 10. The Securities and Exchange Commission wrote an opinion which is annexed hereto as Appendix B, *infra,* page 15.

Jurisdiction

The judgment of the Court of Appeals was made and entered on October 9, 1967, a copy of which appears herein as Appendix C, *infra,* page 30. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Is not the Investment Advisers Act, 54 Stat. 847 (15 U.S.C., Section 80b, 1-21) repugnant to the First Amendment to the Constitution of the United States in that it provides a restraint upon the press and upon expression?

2. Is not Section 211 of said Act repugnant to the First Amendment and Fifth Amendment to the Constitution of the United States in that it empowers the respondent to make rules and regulations without standards and thus provides a mode of restraint upon expression which is uncircumscribed?

3. Is not the finding of respondent that the advertisements of petitioner appealed to an "unsophisticated investor" an invalid restraint upon expression, protected by the First Amendment?

4. Is not the finding by the respondent that the advertisements of the petitioner were fraudulent in violation of Section 206 of said Act, arbitrary and invalid?

5. Was not the act of the respondent arbitrary in that it revoked the registration of petitioner because petitioner had not promptly amended its registration application to disclose that one Schreiber, an officer of petitioner, had in some unrelated matter had violated provisions of the securities laws?

6. Was not the act of the respondent arbitrary in revoking the registration even if the registration application was amended within three months after the change of status of Schreiber and in the face of the fact that the respondent has no rule or other provision which fixes a time within which such amendments must be made?

7. Was not the revocation of the registration of the petitioner an arbitrary and excessive remedy for the alleged wrongs committed by the respondent?

8. Was not the revocation of the registration of the petitioner a denial of due process under the Fifth Amendment, considering the minimal nature of the alleged wrongs?

9. Was not the act of revocation of the registration of petitioner under the circumstances, a cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution of the United States?

10. Was not the petitioner denied due process of law, protected by the Fifth Amendment to the Constitution of the United States in that the findings of the respondent are not supported by substantial evidence?

Statute Involved

The statutory provisions involved is Title II, Section 201-221, 54 Stat. 847, August 22, 1940, c. 686 (15 U.S.C., Section 80b-1-Section 80b-21). It is set out in Appendix D, *infra,* page 31.

Statement

The respondent, The Securities Exchange Commission (SEC or the Commission) instituted a proceeding against petitioner, Marketlines, Inc., to revoke its registration under the statute, popularly known as Investment Advisers Act of 1940. After hearings, the respondent made a decision revoking the registration of petitioner, Appendix B, *infra.* The petitioner sought review in the Court of Appeals, Second Circuit; but that court affirmed with opinion, Appendix A, *infra.*

The petitioner publishes two market letters which it distributes to subscribers. At the time of the hearings it

published "Marketlines", which had about 800 subscribers (A. 21, 23, "A." refers to petitioner's appendix in the court below) and "The Penny Speculator" which then had 300 (A. 22, 23, 70). These publications constitute the sole business of petitioner. The publications contain information of value to the general public. They are not advisory in the sense of providing solutions for a given person in the sense that a lawyer or physician advises with a particular person with respect to a particular problem or state of facts. Rather, the publications are comparable to publications that advise and guide the general public as to good restaurants, drama, music or hotels.

Since the respondent has not found grounds to complain as to the content of the publications, it has sought to censor them or destroy them by a collateral attack. Its attack came by charges against petitioner in two unrelated ways:

1. It accused the petitioner of having delayed notifying SEC of the fact that an employee of petitioner had been disciplined in an unrelated matter.

2. That in the advertisements for subscriptions to the two publications the petitioner had offered "free" material and exaggerated that "The Penny Speculator" was backed by experience of financial experts.

In December 1962 the petitioner filed an application with respondent for registration as an investment advisor. It did so because the statute in question, Section 80b-2(11) and 80b-3 so requires. David Romanoff during that time was the owner of all the shares of stock of that company and was its principal officer and a director. The registration became effective on January 25, 1963.

On June 10, 1963 one Harold Schreiber became a director and officer of the petitioner. On January 11, 1965 he resigned those offices, but remained with petitioner as an employee. He resigned those offices because in January

1965 he was named in a disciplinary proceeding. On January 19, 1965, petitioner filed its amendment to its registration application with respondent, SEC. In March 1965, the respondent notified petitioner that because Schreiber had remained in the employ of petitioner, a further amendment would have to be filed to reflect that condition. In March 1965, the petitioner complied and filed such amendment.

It should be emphasized in connection with this charge that:

1. Although the charge and the finding of SEC is that petitioner delayed in making the amendment, the amendment had been made in January 1965, the very month of the involvement of Schreiber in discipline and that when SEC had insisted in March 1965 that the amendment was not adequate, the petitioner promptly complied by filing the additional amendment in March 1965. Whatever delay there was, was not in bad faith and at most, the delay was minimal and without prejudicial effect;

2. Romanoff, the owner of the corporation testified that he did not know that the status of an employee had to be reported (A. 75).

Reasons for Granting the Writ

1. This case presents several novel questions in the area of freedom of expression. Petitioner has been put out of business of publishing by the order of SEC. The source for this repressive action is the statute involved. In this connection, it should be repeatedly observed that the SEC did not repress for anything contained in the publications. The respondent chose instead to put the petitioner out of the publishing businels by finding that certain advertising of petitioner was fi udulent and because an employee was not reported with the dispatch that the Commission sug-

gested *ad hoc* was not adequate. The Commission did not seek to stop the advertising. Instead, it resorted to a claimed authority in the statute to destroy the publishing of the petitioner.

2. If attempts were made to end the publishing career of Ginzburg of *Ginzburg* v. *United States,* 383 U. S. 413, because his advertising was condemned, such attempts would meet with the speedy disapproval of this court as a forbidden restraint of the press, *Near* v. *Minnesota,* 283 U. S. 697, *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436. The petitioner's plight is no different. The petitioner is publishing information of value to the public. His publication is entitled to the protection of the First Amendment to the Constitution of the United States as any other publication. This is not the case of a denial of protection based on a commercial leaflet such as was *Valentine* v. *Chrestensen,* 316 U. S. 52. *Chrestensen* involved the distribution of an advertising leaflet. The publication itself pertained to a commercial venture. Here, the petitioner's publication dealt with information which others thought well enough of, to be willing to pay a substantial sum to get it. The petitioner's publications are kindred to any guide book or publication of criticism. Would this court for one moment permit the suppression of criticism or approval of a theatrical play? Yet, such criticism may lead to the destruction of substantial property values or the enhancement of values by undeserved praise of a play. In both cases, information of critical value is broadcast to the public. Petitioner's publications are not commercial expression, for it does not seek to sell a commodity or service. They merely seek to inform. And the fact that petitioner informed for compensation does not deprive it of the protection of the First Amendment, *Winters* v. *New York,* 333 U. S. 367.

3. The Commission may not suppress a publication by indirection. The respondent did not find fault with the pub-

lications. It did not complain about them or bring charges against them. Considering the picayune charges it brought against the petitioner to put it out of the publishing business and the injection of extraneous evidence against Romanoff, one cannot escape the conclusion that what SEC did not like was Romanoff and directed its attack against him. That raises the question may a governmental agency suppress a publication because it does not like the publisher? The answer is perfectly clear because this court has repeatedly held that even the worst of persons have a right to express themselves, *Terminiello* v. *Chicago,* 337 U. S. 1; *Kunz* v. *New York,* 340 U. S. 290.

4. It still remains to be urged that there is no causal connection between the respondent's objection to the advertisement (an objection whose triviality challenges the sincerity of SEC). If the Commission was sincere in its objection, it could have sought to abate or control the advertising. But its use of the advertising objection to suppress petitioner raises the question whether the protections of the First Amendment are satisfied when no causal connection exists between the advertising of a publication and the *contents* of the publication. We submit that no such relationship exists; they are independent of each other. Therefore, due process has been denied to the petitioner, *Schware* v. *New Mexico,* 353 U. S. 532; *Konigsberg* v. *California,* 353 U. S. 552.

5. The respondent found the advertising "fraudulent". It created its own concept of fraud without authority from Congress. It did not impute any intent by the petitioner to defraud or deceive. It applied what it called an appeal to the "unsophisticated investor". This of course, is a new form of fraud. While one should not object to newness, still one may challenge not only the authority of SEC to create such standards, but also object that such test deprives one of both due process and the protection of the First Amendment as to expression. May one not utter words which in

their ordinary meaning are innocent to the average person? Should one be condemned because a bending and torturing of words may have an unintended effect on an unintended reader, like a moron? *Butler* v. *Michigan*, 352 U. S. 380, teaches that the quality and character of literature is not to be governed by the standards for the incompetent.

6. The SEC was so eager to suppress petitioner's right to publish, that it even arbitrarily seized upon one of the registration requirements of the statute as a medium to destroy petitioner. It claimed a failure to comply with the statute because there was a delay in amending its registration application. The facts were that one Schreiber, who was an officer of the petitioner became involved in a disciplinary action, wholly unrelated to petitioner, in January 1965. The petitioner amended its registration file in January 1965 to show that Schreiber had resigned as an officer. The SEC in March 1965 notified petitioner that the amendment was not adequate because Schreiber had remained an employee. Petitioner promptly in March 1965 amended its registration to disclose that fact. Yet SEC charged that this was a condemnable delay, sufficient to destroy petitioner's publishing business! If the respondent had not been intent to pursue its design to suppress petitioner, would it have urged this minutiae as a charge? The answer is clear that the respondent was intent upon suppressing the publications and seized upon any trifle in its campaign to get petitioner out of the publication business. This it cannot do without infringing upon petitioner's protections under the First Amendment.

7. The vice that enables respondent to assert the powers to suppress is found in the statute itself in that on its face it provides for an unconstitutional scheme of prior restraint upon publications. So far as the statute applies to publications that inform in general concerning values of corporate investments to persons in general, it enables the SEC to control such publications. Such controls are denied to the gov-

ernment by the First Amendment. That Amendment inhibits the making of any law that abridges the freedom of speech or of the press. The statute involved enables the government by a construction and the application of the law to abridge that right. This case clearly points up the abuse to which the statute may be put. To allow what was done in this case, would approve legislation and administration action which could censor and suppress publications on medicine or law, because it could be claimed that it is in the public interest to regulate publications that may affect the lives of persons. It should be emphasized again, that the petitioner's publications treat of the subject generally and are for distribution to the public generally. They do not advise a particular person concerning his particular problem, as would be the case of a consultation with a physician or lawyer.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, December 20, 1967.

Respectfully submitted,

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APPENDIX A

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 139—September Term, 1967.

(Argued September 27, 1967 Decided October 9, 1967.)

Docket No. 31113

MARKETLINES, INC.,

Petitioner,

—v.—

THE SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Proceeding on petition for review of an order of the Securities and Exchange Commission which revoked petitioner's registration as an investment adviser under the Investment Advisers Act of 1940, 15 U. S. C. § 80b, et seq.

Affirmed.

GIDEON CASHMAN, New York, N. Y. (Pryor, Braun, Cashman & Sherman, Alvin Chriss, of counsel), *for petitioner.*

WALTER P. NORTH, Associate General Counsel, Securities and Exchange Commission,

Washington, D. C. (Philip A. Loomis, Jr., General Counsel, Jacob H. Stillman, Special Counsel, Theodore S. Kaplan, Attorney, Securities and Exchange Commission, of counsel), *for respondent.*

PER CURIAM:

Marketlines, Inc. (Marketlines) seeks review of an order of the Securities and Exchange Commission (Commission) which revoked its registration as an investment adviser under the Investment Advisers Act of 1940.[1] The Commission relied upon two unrelated series of events. It found that Marketlines, aided and abetted by David S. Romanoff, president, treasurer and sole stockholder, and Harold Schreiber, who was vice-president and secretary until January 11, 1965 and continued his association with the company thereafter, violated the anti-fraud provisions of Section 206 of the Act by publishing misleading advertisements soliciting subscriptions to its market letters "Marketlines" and "The Penny Speculator." It also held that Marketlines violated Sections 203(d), 204 and 207 of the Act, by failing promptly to amend its registration application to disclose that Schreiber was associated with the firm and by not disclosing that Schreiber had been found to have violated various provisions of the securities laws in another proceeding.[2]

The challenged advertisements appeared in New York neswpapers of general circulation during the early part of 1965. For present purposes it is sufficient to note that the advertisements made exaggerated claims that The Penny Speculator was a "unique" service, backed by the research

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[1] 15 U. S. C. § 80b, et seq.

[2] *Market Values, Inc.*, C. C. H. Fed. Sec. L. Rep. ¶77,185 (1964).

and experience of "financial scientists and chartists."[3] The ads also promised "free" material to new subscribers and offered the use of "timing devices for maximum trading profits" without disclosing the risks and limitations of such devices. Not only did the references in the ads to "free" materials and "timing devices" violate specific Commission rules,[4] but the Commission could properly conclude that the entire content and tone of the advertisements was designed to whet the appetite of the unsophisticated. Marketlines objects to the evaluation of its ads by the Commission under the "unsophisticated investor" test but the Commission's duty to protect the gullible is apparent.[5] And, we have held that it is not improper to judge advertisements by their impact on the segment of the public at which they are aimed, *Ward Laboratories, Inc.* v. *F. T. C.*, 276 F. 2d 952 (2d Cir. 1960), *cert. denied*, 364 U. S. 827 (1960).

In connection with the appropriate amendment of its registration application, Marketlines argues that its delay was not "willful" since it was filed within 3 months of

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[3] In this connection we note that Romanoff, who was the principal provider of editorial comment, failed to pass an examination as an investment adviser in Illinois and Marketlines was prohibited from acting as an adviser in that state. See *Marketlines, Inc.* v. *Chamberlain*, 63 Ill. App. 2d 274, 211 N. E. 2d 399 (1965).

[4] See Rules 206(4)-1(a)(3) and 1(a)(4), 17 CFR 275.206(4)-1(a)(3) and 1(a)(4).

[5] Marketlines argues that it was unfairly surprised by the Commission's position since almost all of the challenged advertisements appeared before the Commission's decision in *Spear and Staff*, C. C. H. Fed. Sec. L. Rep. ¶77,216 (March 25, 1965), which it says was the first decision giving notice as to what would be considered improper investment advisory material. But the Commission's position had been made clear well before Marketlines committed its violations in a report of a Special Study of Securities Markets it submitted to Congress on April 3, 1963. See H. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess., pp. 367-69, 381-83 (discussing the Spear & Staff violations which took place in 1961).

Schreiber's status change, and the Commission's Rules do not provide any specific time limitation. But, the response to this is that in addition to Marketlines' amendment not being filed "promptly," it was misleading; an amendment filed January 21, 1965 merely indicated that Schreiber was no longer an officer of the firm but concealed until March 24, 1965, when an additional amendment was filed following prodding by the Commission staff, that he had not terminated his association as an employee. Moreover, there was never any disclosure that Stanley Chandler, a part time employee, also had been implicated in other Commission proceedings.[6] The registration and disclosure provisions are crucial to the operation of the Act and we cannot condone their blatant abuse. In sum, we find that the Commission's findings are supported by substantial evidence; we therefore are not free to reach different conclusions of our own. *Consolo* v. *Federal Maritime Commission,* 383 U. S. 607 (1966).

Revocation is, of course, a severe sanction, but the Commission could reasonably find that in the circumstances present here it was necessary to protect the investing public. We are not free to examine the appropriateness of action taken by the Commission as if it were before us in the first instance. In charging the Commission with the enforcement of the Act "in the public interest," Congress necessarily gave it a broad discretion. Cf. *Berko* v. *S. E. C.,* 316 F. 2d 137 (2d Cir. 1963); 2 Loss, Securities Regulation 1323 (2d ed. 1961). Marketlines contends, however, that in determining the public interest the Commission considered improper evidence. But the fact that Romanoff

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[6] Romanoff testified that he was unaware of Chandler's status. But the Commission could reasonably reject this explanation. Chandler was a part time employee of Marketlines and, in addition, was the sole employee of another company owned by Romanoff which shared Marketlines' offices, and had been implicated in the same proceedings as Schreiber.

failed to pass an examination to qualify as an investment adviser in Illinois and in 1950 was found guilty of various serious crimes and was disbarred in New York, is quite relevant to a determination as to whether it is in the public interest for him to continue as an investment adviser—an occupation which can cause havoc unless engaged in by those with appropriate background and standards. Nothing in the Act prohibits the Commission from considering such evidence. Petitioner's remaining contentions are devoid of merit.

The order is affirmed.

APPENDIX B

FINDINGS, OPINION AND ORDER REVOKING INVESTMENT ADVISER REGISTRATIONS

(Investment Advisers Act Release No. 206)

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

January 20, 1967

In the Matters of

MARKETLINES, INC.
50 Broad Street,
New York, New York

(801-3091)

ELIZABETH SCHREIBER
doing business as
COMMODITY TRADING ADVISORY SERVICE
65 Stuart Street
Lynbrook, New York

(801-3066)

Investment Advisers Act of 1940—
Section 203(d)

INVESTMENT ADVISER REGISTRATIONS

Grounds for Revocation

Deceptive Advertisements

Where registered investment adviser's advertisements, soliciting subscriptions to its market letters, presented

highly optimistic picture of profits that would accrue to subscribers and failed to disclose risks inherent in purchase and sale of securities, implied that techniques for evaluating securities can be reduced to exact science and that it employed large staff of financial analysts, referred to use of timing devices for maximum trading profits without the disclosing limitations of such devices, and offered "free" material although offer conditioned on purchase of trial subscription, *held,* advertisements deceptive and use constituted willful violations of anti-fraud provisions of Section 206 of Investment Advisers Act of 1940 and Rule 17 CFR 275.206(4)-1 thereunder.

Failure to Amend Applications for Registration

Where registered investment advisers failed to amend or promptly amend applications for registration to disclose adverse findings, made in Commission decision revoking investment adviser registration of and denying broker-dealer registration to another firm, with respect to officer and employee of one and sole proprietor and controlling person of other investment adviser, *held,* willful violations of Sections 203(d), 204 and 207 of Investment Advisers Act of 1940 and Rule 17 CFR 275.204-1 thereunder.

Practice and Procedure

Where, in course of informal preliminary inquiry over telephone by Commission investigator, sole proprietor of registered investment adviser made statements indicating that her husband was controlling person of such investment adviser, *held,* such statements properly admitted in evidence although investigator did not advise her that she was entitled to consult counsel and that any statements she made might be used against her.

Public Interest

Where one registered investment adviser used false and misleading advertising material, failed to amend or

promptly amend application for registration to make required disclosures of previous violations of officer and employee, and acted as investment adviser in a State in violation of its laws, and other registered investment adviser failed to amend registration application to make required disclosure of previous violations of sole proprietor and controlling person, and latter had pleaded guilty to criminal charges involving securities, *held,* under all the circumstances, in public interest to revoke investment adviser registrations.

APPEARANCES:

SIDNEY LAPIDUS, of the New York Regional Office of the Commission for the Division of Trading and Markets.

GIDEON CASHMAN, of Pryor, Braun, Cashman & Sherman, for respondents.

Following hearings in these consolidated proceedings pursuant to Section 203(d) of the Investment Advisers Act of 1940 ("Advisers Act"), the hearing examiner filed an initial decision in which he found that Marketlines, Inc. ("Marketlines") and Elizabeth Schreiber, doing business as Commodity Trading Advisory Service ("Commodity"), registered investment advisers, aided and abetted by certain associated persons, willfully violated the Advisers Act, and he concluded that registrants' registrations should be revoked. We granted a petition for review filed by registrants and the associated persons, petitioners filed a supporting brief, and our Division of Trading and Markets ("Division") filed a brief in support of the initial decision. Our findings are based upon an independent review of the record.

FRAUDULENT ADVERTISEMENTS BY MARKETLINES

Between January 1, 1965 and July 15, 1965, when these proceedings were instituted, Marketlines, willfully aided

and abetted by David S. Romanoff, president, treasurer, and sole stockholder, and Harold Schreiber, who was vice-president and secretary until January 11, 1965 and continued his association with Marketlines thereafter willfully violated the anti-fraud provisions of Section 206 of the Advisers Act and Rule 17 CFR 275.206(4)-1 thereunder in that it published and distributed materially false and misleading advertisements of its market letters.

Marektlines' advertisement published on January 7, 1965 in a New York newspaper and soliciting subscriptions to its market letter, "The Penny Speculator," stated that "interest in Low PRICED STOCKS is opening profit possibilities that will undoubtedly pave the way for many family fortunes in the years just ahead"; that Marketlines "has developed a completely unique advisory service"; that the "15 Points TOWARD PROFIT", which were items covered by the market letter, are "backed by the research and experience" of Marketlines' "financial scientists and chartists," and that the "tremendous value" of those points will be recognized by investors "who want to protect and enhance their capital." Virtually identical advertisements appeared in the same and other New York newspapers published on January 11 and 23, and March 7 and 13, 1965.[1] Another advertisement which appeared in the April 4, 1965 issue of a financial journal similarly referred to the market letter as "a unique advisory service devoted exclusively to the goal of capital gains," and to the "research and experience of Marketlines' financial analysts and chartists."

These advertisements, in presenting a highly optimistic picture of the profits that would accrue to subscribers to the market letter, were materially misleading in failing to disclose the risks inherent in the purchase and sale of securities and were obviously designed to whet the specula-

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[1] In the March 13, 1965 advertisement, the word "analysts" was substituted for "scientists."

tive appetite of unsophisticated investors and thereby induce them to subscribe. As we stated in *Spear and Staff, Incorporated:*

> "In appraising advertisements . . . we do not look only to the effect that they might have had on careful and analytical persons. We look also to their possible impact on those unskilled and unsophisticated in investment matters."[2]

The reference to "financial scientists" was highly misleading in implying that techniques for evaluating securities can be reduced to an exact science. Further, the reference to the research and experience of the firm's personnel implied that the firm employed a large staff of financial analysts when in fact such staff consisted of Schreiber and Romanoff, with the latter principally providing editorial comment and review.[3]

Moreover, the above newspaper advertisements stated that the market letter brought to its subscribers such features as the "use of timing devices for maximum trading profits." Since the advertisements did not disclose the limitations of such devices and the difficulties with respect to their use, they were expressly prohibited by Rule 17 CFR 275. 206(4)-1(a)(3) under Section 206 of the Advisers Act.

Marketlines also prepared and mailed an advertising brochure promoting "The Penny Speculator" and another market letter called "Marketlines." The envelope proclaimed: "AN INVITATION TO READ AN EXTRAORDINARY NEW

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[2] Investment Advisers Act Release No. 188, p. 5 (March 25, 1965). See also *Private Investment Fund for Governmental Personnel, Inc.*, 37 S.E.C. 484, 487 (1957).

[3] In this connection we note that Romanoff failed to pass an examination to qualify as an investment adviser in the State of Illinois.

CONCEPT IN MARKET PROFITS."; "CAN YOU STRIKE IT RICH"; and "MARKETLINES—THE LETTER PROFESSIONALS READ." The enclosed brochure stated in large type "Announcing The Most Revolutionary New Investment Service Concept To Come Along In Years—Giving You An Invaluable Double Opportunity for Stock Market Profits." These flamboyant statements were misleading in presenting the market letters as providing extraordinary and reliable profit-producing advice. While the text of the brochure, which was in very small print, tended to show that risks were involved in the purchase and sale of securities, in our opinion the misleading nature of the large-type statements was not thereby cured since they did their "damage through [their] initial effect on the prospective" subscriber.[4]

Finally, the newspaper advertisements and the brochures offered "free" material with the purchase of a trial subscription. Such offer contravened subsection (a)(4) of Rule 206(4)-1 which states that it shall constitute a fraudulent or deceptive act or practice for an investment adviser to publish or distribute any advertisement which states that any material will be furnished free unless such material "actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly."

Marketlines asserts that the acceptance of the advertisements for publication by leading New York newspapers is cogent evidence of their propriety, and that the advertisements conformed to prevailing standards of investment adviser advertising. But under the Advisers Act it is for this Commission and the courts, not commercial publications, to determine whether an investment adviser has violated the provisions of that Act. Moreover, we do not agree that Marketlines' advertisements are typical and

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[4] *The Private Investment Fund for Governmental Personnel, Inc., supra,* 37 S.E.C. at 490; see also *Spear & Staff, Incorporated supra,* p. 6; *Del Consolidated Industries, Inc.,* Securities Act Release No. 4795, pp. 2-3 (July 26, 1965).

our prior decisions imposing high standards in this area compel rejection of this defense.[5]

Romanoff, as president of Marketlines , is clearly responsible for the violations found. Schreiber, the other principal officer until his resignation on January 11, 1965, and thereafter an employee, is also chargeable with responsibility for the newspaper advertisements.[6] Both while an officer and thereafter he participated with Romanoff and representatives of advertising agencies in the preparation of these newspaper advertisements.[7]

FAILURE TO AMEND APPLICATIONS FOR REGISTRATION

Marketlines, aided and abetted by Romanoff and Harold Schreiber, and Commodity, aided and abetted by Harold Schreiber, willfully violated Sections 203(d), 204 and 207 of the Advisers Act and Rule 17 CFR 275.204-1 thereunder in that they failed to make or promptly make certain required disclosures in amendments to their applications for registration, which had become effective in January 1963 and October 1948, respectively.

MARKETLINES

Marketlines failed to amend its application for registration until March 24, 1965 to disclose our finding in *Market Values, Inc.*, which was issued on December 31,

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[5] See *Spear & Staff, Incorporated, supra; Paul K. Peers, Inc.*, Investment Advisers Act Release No. 187 (March 22, 1965); *Anne Caseley Robin*, Investment Advisers Act Release No. 149 (September 10, 1963).

[6] The hearing examiner found that Schreiber, after resigning, continued to exercise a controlling influence over Marketlines. We do not reach this issue.

[7] The record shows that 75,000 to 100,000 brochures were circulated from the end of January to March 1965, but it does not appear whether Schreiber participated in preparing or circulating them.

1964,[8] that Harold Schreiber caused materially false and misleading statements in Market Values' application for investment adviser registration.[9] We reject Marketlines' contention that the delay of less than three months was not unreasonable. The application for registration is a vital element in our regulation of investment advisers and a delay of such duration is inconsistent with the duty to keep filings current.[10]

In addition, the amendment of March 24, 1965, failed to disclose that Stanley Chandler, a part-time employee of Marketlines and the sole employee of another company owned by Romanoff which rendered mailing services for Marketlines and shared the latter's offices rent-free, had as vice-president of Market Values also been found to have caused the false and misleading statements in that firm's application. These amendments further failed to disclose our findings that Schreiber aided and abetted violations of the Exchange Act.[11]

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[8] Investment Advisers Act Release No. 181.

[9] We found that Market Values, for the purpose of concealing the identity of Harold Schreiber in order to protect his then employment with an exchange member, did not list his name as a controlling person in its application and falsely stated therein that Mrs. Schreiber (her maiden name was used) was the beneficial owner of a substantial interest in Market Values, which in fact was beneficially owned by her husband, and that the application also falsely stated that Market Values was not engaged in any business other than that of investment adviser although it rented out mailing lists. We held that Market Values thereby willfully violated Sections 203(c) and 207 of the Advisers Act.
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[10] *Cf. Peoples Securities Company*, 39 S.E.C. 641, 644-45 (1960), *aff'd* 289 F. 2d 268 (C.A. 5, 1961); *Justin Federman Stone*, Investment Advisers Act Release No. 153, p. 6 (November 26, 1963).

[11] We found that Market Values' statement of financial condition, which was filed as a supplement to its application for broker-dealer registration and which was sworn to by Schreiber, materially

(Footnote continued on following page)

Marketlines asserts that since Schreiber had resigned as an officer eleven days after issuance of the *Market Values* decision and thereafter served only as an employee, it was not required to disclose our findings with respect to him. Even aside from any requirement of disclosure within the eleven-day period, the application calls for such disclosure with respect to controlled persons or employees as well as officers. Nor does the fact that our staff was unable to serve Chandler with the order for proceedings in *Market Values* make our findings therein as to him a nullity nor justify the failures to disclose them. We appropriately make such findings pursuant to Section 203(d) of the Advisers Act insofar as they were relevant to the issues relating to Market Values.[12]

We further find no substance to Marketlines' contention that any violations with respect to non-disclosure of our findings in Market Values were not willful.[13] Romanoff knew, at least when Schreiber resigned, that his resignation was due to the fact that he was the subject of Commission proceedings and that a decision had been issued. Examination of that decision would also have disclosed our find-

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(Footnote continued from preceding page)

overstated the applicant's assets, in willful violation of Section 15(b) of the Exchange Act and Rule 17 CFR 240.15b-8 thereunder. We revoked Market Values' investment adviser registration, denied its application for broker-dealer registration, and found Schreiber a cause of such denial. An appeal from this decision was dismissed upon default in February 1966.

[12] Our findings as to Chandler were without prejudice to an application by him to reopen the record to contest them. Investment Advisers Act Release No. 181, p. 3, n. 4. No such application has been filed.

[13] See *Tager* v. *S.E.C.*, 344 F. 2d 5, 8 (C.A. 2, 1965): "It has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts."

ings against Chandler.[14] Schreiber's knowledge and participation are of course obvious.

COMMODITY

A supplement to Commodity's application for registration, filed in November 1962, failed to disclose that Harold Schreiber exercised a controlling influence over the management or policies of Commodity, and was not amended to disclose our findings in the *Market Values* case with respect to him as well as the findings that Elizabeth Schreiber, as secretary-treasurer of Market Values, had together with her husband aided and abetted in Market Values' violations of the Exchange Act.

The record shows that Schreiber in fact ran Commodity. Mrs. Schreiber stated in the November 1962 supplement that she had been operating an antique gallery since March 1962, and she subsequently admitted that her husband was the controlling person in Commodity. A staff investigator in the Section of Investment Adviser Inspections telephoned Elizabeth Schreiber in April 1965 and, in answer to the question whether she was registered as an investment adviser, stated, "that's my husband," and when asked whether Commodity was active replied, "I imagine it is. If you want to know anything about it, you'll have to call my husband." She also referred him to her

[14] The hearing examiner further concluded that Marketlines failed to amend its application to disclose that on April 29, 1964, it had been prohibited by Illinois' Secretary of State from acting as an investment adviser in that State, which prohibition had been affirmed by the Illinois State courts. See *Marketlines, Inc.* v. *Chamberlain*, 63 Ill. App. 2d 274, 211 N.E. 2d 399 (1965). The application form called for disclosure of orders "of any court" enjoining the applicant from acting as an investment adviser. Even if the failure to disclose the Illinois order is a violation because of the affirmance of that order in the courts, given the fact that language of the form does not expressly deal with such a situation, we do not attach any weight to such failure in assessing the sanction to be imposed.

husband when he asked whether she could tell him anything about the "service."

Commodity now contends for the first time that the admission of this telephone conversation in evidence was unfair and violated due process because the investigator did not warn Mrs. Schreiber that she was entitled to consult counsel and that any statements she made might be used against her. The Division argues that under the circumstances it was not necessary for the investigator to so advise Mrs. Schreiber and we agree.[15] We also reject the contention that the failure to disclose our findings in *Market Values*, particularly since Mrs. Schreiber could

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[15] *Miranda* v. *Arizona*, 384 U. S. 436 (1966), a criminal case cited by the respondents, does not require a contrary conclusion. Even assuming that the constitutional necessity for the procedural safeguards against self-incrimination attaches in the context of administrative proceedings, that case expressly limits it to situations where defendant makes inculpatory statements while in custody, i.e., where the "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (at p. 444). Mrs. Schreiber was not "in custody" or deprived of her "freedom of action" in answering the questions of the investigator over the telephone and her answers were clearly voluntary.

Commodity also argued that the investigator's testimony was inadmissible because it did not appear that he warned Mrs. Schreiber that he was conducting an investigation. However, no objection was raised as to the admissibility of the investigator's testimony at the hearings and the investigator was not questioned, either on direct or cross-examination, concerning any statements he may have made to Mrs. Schreiber as to his identity or the purpose of his call, and Mrs. Schreiber did not testify. Under these circumstances, we do not think it proper to assume, as Commodity's argument would have us do, that the investigator did not identify himself to Mrs. Schreiber merely because he did not affirmatively advert to that question in testifying, in connection with the substantive issues in the case, to his conversation with her concerning Commodity. In any event, *cf. Hoffa* v. *U.S.* 35 U.S.L. Week 4058, 4061 (U. S. December 12, 1966), which held that the admission of a criminal defendant's statement to an associate who was a paid government informer did not in itself violate the due process clause. *Cf.* also *Lewis* v. *U. S.*, 35 U.S.L. Week 4072 (U. S. December 12, 1966).

not have considered that case to be unknown to us, did not in and of itself justify a finding of willfulness.[16]

CONSOLIDATION OF PROCEEDINGS

Petitioners contend that the consolidation of these proceedings against Marketlines and Commodity was prejudicial by creating an atmosphere of guilt by association. However, since as we have seen these proceedings involved common questions of law and fact, they were properly consolidated under Rule 17 CFR 201.10 of our Rules of Practice.[17] Moreover, no showing of prejudice has been made. The hearing examiner is not only legally trained and judicially oriented, but his evaluation of the evidence applicable to each registrant has also been reviewed by us. Under these circumstances, we fail to see any basis for respondents' fear that the examiner or this Commission could be influenced to find "quilt by association."[18]

PUBLIC INTEREST

Petitioners assert there was no substantial showing of harm to the public to warrant revocation of registrants' investment adviser registrations, and at most the viola-

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[16] See, *e.g.*, *Morris J. Reiter*, Securities Exchange Act Release No. 6849 (July 13, 1962), which held that failure to amend a registration application to disclose an injunction was willful even though this Commission, being the complainant in the injunction action was aware of it. As we there noted the requirements pertaining to registration applications are designed to make available to the public by an inspection of the application significant facts bearing on the registrants background.

[17] See *Siltronics, Inc.*, Securities Exchange Act Release No. 7150, p. 6 (September 30, 1963).

[18] *Cf. Clinton Engines Corporation*, Securities Exchange Act Release No. 4585, p. 3 (March 4, 1963); *J. A. Winston & Co., Inc.*, Securities Exchange Act Release No. 7337, pp. 11-12 (June 8, 1964). See also *Donnelly Garment Co.* v. *N.L.R.B.*, 123 F. 2d 215, 224 (C. A. 8, 1942): "One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received."

tions were merely technical. We cannot agree with petitioners. As we stated in *Spear & Staff, Incorporated*:

> "Registrants' sensational advertisements featuring the get-rich-quick theme were incompatible with responsible methods of obtaining clients for investment advisory services. Advertisements of this kind have a substantial adverse effect on the public interest. Not only do they tend to mislead and deceive investors, they also tend to debase the standards of the investment advisory industry by creating a competitive environment that tempts advisers to vie with each other in making unsupportable claims to prophetic insight."[19]

And, as we have observed above, the application for registration is a basic and vital part of our administration of the Act.

We further note that in 1950 Romanoff, who was an attorney, was convicted in New York of conspiracy, second degree forgery, grand larceny, and concealment of stolen property, and was disbarred in that state.[20] There is no substance to Marketlines' contention that such background should be disregarded in determining the extent of any sanction to be imposed merely because Romanoff's conviction and disbarment occurred about 13 years before Marketlines filed its application for registration.[21] We

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[19] *Supra*, at p. 8 of cited Release; see also Special Study of Securities Markets of the S.E.C., H. R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. (1963), pp. 367-8.

[20] App. Div., First Dept. (October 20, 1950).

[21] We reject Marketlines' contention that it was prejudiced by the introduction of Romanoff's conviction in evidence before rather than after the substantive question of liability was decided by the hearing examiner. Apart from the fragmentation of the proceedings which would result from postponing evidence relevant on the public interest other than evidence of the violations themselves which is also relevant on that issue, Marketlines' position ignores the facts that hearing examiners are sophisticated enough to distinguish the issues before them and that their conclusions are subject to review by us.

further note that the Illinois bar order against Marketlines, previously mentioned, was based upon its findings that, in violation of the State's registration provisions, Marketlines acted as an investment adviser in Illinois both prior to filing an application for registration and after Romanoff had failed to obtain a passing grade on that State's investment adviser examination.

On the basis of the foregoing, we agree with the hearing examiner that Marketlines' registration as an investment adviser should be revoked.

With respect to Commodity, its violations were limited to the nondisclosure of material information in the supplement to its application for registration. However, the disclosure of the true principals in a firm is especially crucial to the efficiency of the regulatory scheme, and the failure to disclose them defeats the purpose of the registration provisions.[22] This is not the first time that Harold Schreiber's controlling interest in an investment adviser has been concealed. As we have noted, his controlling interest in Market Values also was not disclosed in that firm's application for investment adviser registration. In addition, he together with his wife aided and abetted that firm's willful violations of the Exchange Act in connection with the statement of financial interest in its application for broker-dealer registration. Their conduct here evidences a persistent disregard of applicable regulatory safeguards. Moreover, we have found Harold Schreiber an aider and abettor of Marketlines' willful violations of the anti-fraud and registration provisions of the Advisers Act. Finally, we note that he has pleaded guilty to criminal charges of conspiracy to violate and substantive violations of registration and anti-fraud provisions of the Securities Act of 1953 in the offer and sale of a security.[23]

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[22] *Financial Counsellors, Inc.*, Securities Exchange Act Release No. 7371, p. 5 (July 17, 1964), aff'd 339 F. 2d 196 (C. A. 2, 1964); *L. H. Feigin*, 40 S.E.C. 594, 597 (1961); *Jefferson Associates, Inc.*, 39 S.E.C. 271, 273 (1959).

[23] *U. S.* v. *Hayutin*, 64 Cr. 254 (S. D. N. Y., 1966).

Under all the circumstances, we conclude, as did the hearing examiner, that it is appropriate in the public interest to revoke Commodity's investment adviser registration, rather than grant its request for withdrawal of such registration.

Accordingly, IT IS ORDERED that the registrations as investment advisers of Marketlines, Inc. and Elizabeth Schreiber, doing business as Commodity Trading Advisory Service, be, and they hereby are, revoked.

By the Commission (Chairman COHEN and Commissioners WOODSIDE, OWENS, BUDGE and WHEAT).

ORVAL L. DUBOIS
Orval L. DuBois
Secretary

(Seal)

APPENDIX C

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of October, one thousand nine hundred and sixty-seven.

Present: HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

MARKETLINES, INC. and ELIZABETH SCHREIBER, doing business as Commodity Trading Advisory Service,

Petitioners,

v.

THE SECURITIES AND EXCHANGE COMMISSION,

Respondent.

A petition to review an order of the Securities and Exchange Commission.

This cause came on to be heard on the certified list of items comprising the record from the Securities and Exchange Commission and was argued by counsel.

On consideration thereof, it is now hereby ordered, adjudged and decreed that the order of the Securities and Exchange Commission be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX D

Subchapter II.—Investment Advisers.

§ 80b—1. Findings

Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 79z—4 of this title, and facts otherwise disclosed and ascertained, it is found that investment advisers are of national concern, in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and

(3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.

Aug. 22, 1940, c. 696, Title II, § 201, 54 Stat. 847.

§ 80b—2. Definitions

(a) When used in this subchapter, unless the context otherwise requires—

(1) "Assignment" includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but if the investment adviser is a partnership, no assignment of an investment advisory contract shall be deemed to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser, or from the admission to the investment adviser of one or more members who, after such admission, shall be only a minority of the members and shall have only a minority interest in the business.

(2) "Bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under section 248(k) of Title 12, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(3) "Broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

(4) "Commission" means the Securities and Exchange Commission.

(5) "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in bankruptcy, or similar official, or any

liquidating agent for any of the foregoing, in his capacity as such.

(6) "Convicted" includes a verdict, judgment, or plea of guilty, or a finding of guilt on a plea of nolo contendre, if such verdict, judgment, plea, or finding has not been reversed, set aside, or withdrawn, whether or not sentence has been imposed.

(7) "Dealer" means any person regularly engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, insurance company, or investment company, or any person insofar as he is engaged in investing, reinvesting or trading in securities, or in owning or holding securities, for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

(8) "Director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(9) "Exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understoood, and includes the market place and the market facilities maintained by such exchange.

(10) "Interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof.

(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing

in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 78c(a) (12) of this title, as exempted securities for the purposes of the Securities Exchange Act of 1934; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

(12) "Investment company", affiliated person, and "insurance company" have the same meanings as in the Investment Company Act of 1940. "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

(13) "Investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client.

(14) "Means or instrumentality of interstate commerce" includes any facility of a national securities exchange.

(15) "National securities exchange" means an exchange registered under section 78f of this title.

(16) "Person" means a natural person or a company.

(17) "Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing.

(18) "State" means any State of the United States, the District of Columbia, Puerto Rico, the Canal Zone, the Virgin Islands, or any other possession of the United States.

(19) "Underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission. As used in this paragraph the term "issuer" shall include in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(20) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding Company Act of 1935", and "Trust Indenture Act of 1939", mean those Acts, respectively, as heretofore or hereafter amended.

(b) No provision in this subchapter shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. Aug. 22, 1940, c. 686, Title II, § 202, 54 Stat. 847; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; June 25, 1959, Pub. L. 86-70, § 12(c), 73 Stat. 143; July 12, 1960, Pub. L. 86—624, § 7(d), 74 Stat. 412; Sept. 13, 1960, Pub. L. 86—750, § 1, 74 Stat. 885.

§ 80b—3. Registration of investment advisers

(a) Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) The provisions of subsection (a) of this section shall not apply to—

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are investment companies and insurance companies; or

(3) any investment adviser who during the course of the preceding twelve months has had fewer than

fifteen clients and who does not hold himself out generally to the public as an investment adviser.

(c) Any investment adviser, or any person who presently contemplates becoming an investment adviser, may register under this section by filing with the Commission an application for registration. Such application shall contain such of the following information, in such form and detail, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors:

(1) information in respect of—

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment adviser be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser including the manner of giving advice and rendering anlayses or reports;

(D) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(E) the basis or bases upon which such investment adviser is compensated; and

(F) whether such investment adviser, or any partner, officer, director thereof, or any person performing similar functions, or any person directly or indirectly controlling or controlled by such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (d), and

(2) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser consists or is to consist of rendering investment supervisory services.

Except as hereinafter provided, such registration shall become effective thirty days after receipt of such application by the Commission, or within such shorter period of time as the Commission may determine. Any amendment of an application filed not more than fifteen days after the filing of such application shall be deemed to have been filed with and as a part of such application. Any amendment of an application filed more than fifteen days after the filing of such application and before such application becomes effective shall be deemed a new application incorporating by reference the unamended items of the earlier application. Any amendment filed after the application has become effective shall become effective thirty days after the filing thereof, or at such earlier date as the Commission may order.

(d) The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to, or suspend for a period not exceeding twelve months or re-

voke the registration of, an investment adviser, if it finds that such denial, suspension, or revocation is in the public interest and that (1) such investment adviser, whether prior or subsequent to becoming such, or (2) any partner, officer, or director thereof, or any person performing similar functions, or (3) any person directly or indirectly controlling or controlled by such investment adviser, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration or report filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who has omitted to state in any such application or report any material fact which is required to be stated therein; or (B) has been convicted within ten years preceding the filing of the application or at any time thereafter of any felony or misdemeanor which the Commission finds (i) involves the purchase or sale of any security, (ii) arises out of the conduct of the business of a broker, dealer, or investment adviser, (iii) involves embezzlement, fraudulent conversion, or misappropriation of funds or securities, or (iv) involves the violation of sections 1341, 1342, or 1343 of Title 18, as heretofore or hereafter amended; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of this subchapter, as any of such statutes heretofore have been or hereafter may be amended, or

of any rule or regulation under any of such statutes; or (E) has aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or the Securities Exchange Act of 1934, or of this subchapter, as any of such statutes heretofore have been or hereafter may be amended, or of any rule or regulation under any of such statutes.

(e) The commencement of a proceeding to deny registration under this section shall operate to postpone the effective date of registration for a period of ninety days, or until final determination whether such registration shall be denied if that determination is made within such ninety-day period; but if, after appropriate notice and opportunity for hearing, it shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of such registration beyond such ninety-day period and until final determination of whether such registration shall be denied, the Commission shall so order. Upon request of any interested party, made more than ninety days after the effective date of such order, the Commission shall consider whether such postponement should continue, and shall take such action, if any, with respect thereto as in its discretion is necessary or appropriate in the public interest or for the protection of investors.

(f) Any successor to the business of an investment adviser registered under this section shall be deemed likewise registered hereunder, if within thirty days from its succession to such business it shall file an application for registration under this section, unless and until the Commission, pursuant to subsection (d) of this section, shall deny registration to or revoke or suspend the registration of such successor.

(g) Any person registered under this section may, upon such terms and conditions as the Commission finds necessary in the public interest or for the protection of investors,

withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence or is not engaged in business as an investment adviser, the Commissioner shall by order cancel the registration of such person. Aug. 22, 1940, c. 686, Title II, § 203, 54 Stat. 850; Sept. 13, 1960, Pub. L. 86-750, §§ 2-5, 74 Stat. 885.

§ 80b—4. Reports by investment advisers

Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to section 80b—3 (b) of this title), shall make, keep, and preserve for such periods, such accounts, correspondence, memorandums, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memorandums, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors. Aug. 22, 1940, c. 686, Title II, § 204, 54 Stat. 852; Sept. 13, 1960, Pub. L. 86—750, § 6, 74 Stat. 886.

§ 80b—5. Investment advisory contracts

No investment adviser, unless exempt from registration pursuant to section 80b—3 of this title, shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to enter into, extend, or renew any investment advisory contract, or in any way to

perform any investment advisory contract entered into, extended, or renewed on or after November 1, 1940, if such contract—

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser, if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

As used in this section, "investment advisory contract" means any contract or agreement whereby a person agrees to act as investment adviser or to manage any investment or trading account for a person other than an investment company. Paragraph (1) of this section shall not be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period, or as of definite dates, or taken as of a definite date. Aug. 22, 1940, c. 686, Title II, § 205, 54 Stat. 852; Sept. 13, 1960, Pub. L. 86—750, § 7, 74 Stat. 887.

§ 80b—6. Prohibited transactions by investment advisers

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

Aug. 22, 1940, c. 686, Title II, § 206, 54 Stat. 852; Sept. 6, 1960, Pub. L. 86—750, §§ 8, 9, 74 Stat. 887.

§ 80b—7. Material misstatements

It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b—3 or 80b—4 of this title, or willfully to omit to state in any such application or report any material fact which is required to be stated therein. Aug. 22, 1940, c. 686, Title II, § 207, 54 Stat. 853.

§ 80b—8. General prohibitions

(a) It shall be unlawful for any person registered under section 80b—3 of this title to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof.

(b) No provision of subsection (a) of this section shall be construed to prohibit a statement that a person is registered under this subchapter or under the Securities Exchange Act of 1934, if such statement is true in fact and if the effect of such registration is not misrepresented.

(c) It shall be unlawful for any person registered under section 80b—3 of this title to represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless (1) his or its principal business consists of acting as investment adviser, and (2) a subtantial part of his or its business consists of rendering investment supervisory services.

(d) It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this subchapter or any rule or regulation thereunder. Aug. 22, 1940, c. 686, Title II, § 208, 54 Stat. 853; Sept. 13, 1960, Pub. L. 86—750, §§ 10, 11, 74 Stat. 887.

§ 80b—9. Enforcement of subchapter

(a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person, it may in its discretion require, and in any event shall permit, such person to file with it a statement in writing, under oath or otherwise, as to all the facts and

circumstances relevant to such violation, and may otherwise investigate all such facts and circumstances.

(b) For the purposes of any investigation or any proceeding under this subchapter, any member of the Commission or any officer thereof designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of

a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(e) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in

aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter. Aug. 22, 1940, c. 686, Title II, § 209, 54 Stat. 853; Sept. 13, 1960, Pub.L. 86—750, § 12, 74 Stat. 887.

§ 80b—10. Disclosure of information by Commission

(a) The information contained in any registration application or report or amendment thereto filed with the Commission pursuant to any provision of this subchapter shall be made available to the public, unless and except insofar as the Commission, by rules and regulations upon its own motion, or by order upon application, finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Photostatic or other copies of information contained in documents filed with the Commission under this subchapter and made available to the public shall be furnished to any person at such reasonable charge and under such reasonable limitations as the Commission shall prescribe.

(b) Subject to the provisions of subsections (c) and (e) of section 80b—9 of this title, the Commission, or any member, officer, or employee thereof, shall not make public the fact that any examination or investigation under this subchapter is being conducted, or the results of or any facts ascertained during any such examination or investigation; and no member, officer, or employee of the Commission shall disclose to any person other than a member, officer, or employee of the Commission any information obtained as a result of any such examination or investigation except with

the approval of the Commission. The provisions of this subsection shall not apply—

(1) in the case of any hearing which is public under the provisions of section 80b—12 of this title; or

(2) in the case of a resolution or request from either House of Congress.

(c) No provision of this subchapter shall be construed to require, or to authorize the Commission to require any investment adviser engaged in rendering investment supervisory services to disclose the identity, investments, or affairs of any client of such investment adviser, except insofar as such disclosure may be necessary or appropriate in a particular proceeding or investigation having as its object the enforcement of a provision or provisions of this subchapter. Aug. 22, 1940, c. 686, Title II, § 210, 54 Stat. 854; Sept. 13, 1960, Pub.L. 86—750, § 13, 74 Stat. 887.

§ 80b—11. Rules, regulations and orders of Commission

(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this subchapter. For the purposes of its rules or regulations the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters.

(b) Subject to the provisions of the Federal Register Act and regulations prescribed under the authority thereof, the rules and regulations of the Commission under this subchapter, and amendments thereof, shall be effective upon publication in the manner which the Commission shall prescribe, or upon such later date as may be provided in such rules and regulations.

(c) Orders of the Commission under this subchapter shall be issued only after appropriate notice and opportunity for hearing. Notice to the parties to a proceeding before the Commission shall be given by personal service upon each party or by registered mail or certified mail or confirmed telegraphic notice to the party's last known business address. Notice to interested persons, if any, other than parties may be given in the same manner or by publication in the Federal Register.

(d) No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason. Aug. 22, 1940, c. 686, Title II, § 211, 54 Stat. 855; June 11, 1960, Pub.L. 86—507, § 1(16), 74 Stat. 201; Sept. 13, 1960, Pub.L. 86—750, § 14, 74 Stat. 888.

§ 80b—12. Hearings

Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept. Aug. 22, 1940, c. 686, Title II, § 212, 54 Stat. 855.

§ 80b—13. Court review of orders

(a) Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission

be modfied or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 346 and 347 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by

the court, operate as a stay of the Commission's order. Aug. 22, 1940, c. 686, Title II, § 213, 54 Stat. 855; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85—791, § 26, 72 Stat. 949.

§ 80b—14. Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this subchapter or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity to enjoin any violation of this subchapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enjoin any violation of this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against the Commission in any court. Aug. 22, 1940, c. 686, Title II, § 214, 54 Stat. 856.

§ 80b—15. Validity of contracts

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision. Aug. 22, 1940, c. 686, Title II, § 215, 54 Stat. 856.

§ 80b—16. Annual reports of Commission

The Commission shall submit annually a report to the Congress covering the work of the Commission for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this subchapter as it may find advisable. Aug. 22, 1940, c. 686, Title II, § 216, 54 Stat. 857.

§ 80b—17. Penalties

Any person who willfully violates any provision of this subchapter, or any rule, regulation, or order promulgated by the Commission under authority thereof, shall, upon conviction, be fined not more than $10,000, imprisoned for not more than two years, or both. Aug. 22, 1940, c. 686, Title II, § 217, 54 Stat. 857; Sept. 13, 1960, Pub.L. 86—750, § 15, 74 Stat. 888.

§ 80b—18. Officers and employees of Commission

For the purposes of this subchapter, the Commission may, subject to the civil-service laws, appoint such attor-

neys, examiners, and other experts, and such other officers and employees as are necessary in the execution of the functions of the Commission and fix their salaries in accordance with the Classification Act of 1949. Aug. 22, 1940, c. 686, Title II, § 218, 54 Stat. 857: Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972.

§ 80b—18a. State control of investment advisers

Nothing in this subchapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this subchapter or the rules and regulations thereunder. Aug. 22, 1940, c. 686, Title II, § 222, as added Sept. 13, 1960, Pub.L. 86—750, § 16, 74 Stat. 888.

§ 80b—19. Separability of provisions

If any provision of this subchapter or the application of such provision to any person or circumstances shall be held invalid, the remainder of the subchapter and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby. Aug. 22, 1940, c. 686, Title II, § 219, 54 Stat. 857.

§ 80b—20. Short title

This subchapter may be cited as the "Investment Advisers Act of 1940". Aug. 22, 1940, c. 686, Title II, § 220, 54 Stat. 857.

§ 80b—21. Effective date

This subchapter shall become effective on November 1, 1940. Aug. 22, 1940, c. 686, Title II, § 221, 54 Stat. 857.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 942

MARKETLINES, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10–14) is reported at 384 F. 2d 264. The opinion of the Securities and Exchange Commission (Investment Advisers Act Release No. 206, January 20, 1967) (Pet. App. 15–29) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1967. The petition for a writ of certiorari was filed on December 22, 1967. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

[1] A second Memorandum Opinion which denied a motion for reconsideration is also unreported.

QUESTIONS PRESENTED

1. Whether the Commission's findings that petitioner willfully violated the registration and antifraud provisions of the Investment Advisers Act of 1940 are supported by substantial evidence.

2. Whether in view of the serious nature of the violations found, and in view of the prior unlawful conduct of petitioner and its president, revocation of petitioner's registration as an investment adviser was a proper exercise of the Commission's discretion.

3. Whether petitioner has been denied its right to freedom of the press under the First Amendment to the Constitution.

STATUTES INVOLVED

The relevant provisions of the Investment Advisers Act of 1940, 54 Stat. 847, 15 U.S.C. 80b–1 *et seq.*, are set forth in Appendix D to the petition.

STATEMENT

Petitioner, Marketlines, Inc., was registered with the Securities and Exchange Commission as an investment adviser in January 1963. David Romanoff is the president, treasurer, and sole stockholder of petitioner. Harold Schreiber was vice-president and secretary of petitioner until his resignation from these offices in January 1965, after which he continued to be an employee of petitioner.

Between January 1, 1965, and July 15, 1965, petitioner solicited subscriptions to its market letters, "The Penny Speculator" and "Marketlines," through several advertisements in New York newspapers and through a mailed advertising brochure. The Commis-

sion held that petitioner's advertisements were "materially false and misleading," in violation of the anti-fraud provisions of Section 206 of the Investment Advisers Act, 15 U.S.C. 80b–6. The Commission found that the advertisements presented "a highly optimistic picture of the profits that would accrue to subscribers * * * [and] were materially misleading in failing to disclose the risks inherent in the purchase and sale of securities and were obviously designed to whet the speculative appetite of unsophisticated investors and thereby induce them to subscribe" (Pet. App. 18–19);[2] that the terminology used in the advertisements implied "that techniques for evaluating securities can be reduced to an exact science" and that the firm employed a large staff of financial analysts, when in fact the staff consisted solely of Romanoff and Schreiber (Pet. App. 19);[3] and that the references in the advertise-

[2] The Commission noted (Pet. App. 19–20):

> "The envelope [in which the brochure was mailed] proclaimed: 'AN INVITATION TO READ AN EXTRAORDINARY NEW CONCEPT IN MARKET PROFITS'; 'CAN YOU STRIKE IT RICH'; and 'MARKETLINES THE LETTER PROFESSIONALS READ.' The enclosed brochure stated in large type, 'Announcing The Most Revolutionary New Investment Concept To Come Along In Years—Giving You Invaluable Double Opportunity For Stock Market Profits.'"

[3] Advertisements placed in New York newspapers to solicit subscribers to "The Penny Speculator" stated that "interest in LOW PRICED STOCKS is opening profit possibilities that will undoubtedly pave the way for many family fortunes in the years just ahead"; and that Marketlines "has developed a completely unique advisory service," "backed by the research and experience" of Marketlines' "financial scientists and chartists" (Pet. App. 18).

ments to "timing devices," without disclosing the limitations of such devices, and to "free material," which could be obtained only with the purchase of a trial subscription, were expressly prohibited by the Commission's advertising rules promulgated under Section 206 (Pet. App. 19–20).[4]

The Commission also held that petitioner, aided and abetted by Romanoff, willfully violated the registration provisions of the Act[5] by (1) failing to amend

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[4] Rule 206(4)–1, 17 C.F.R. 275.206(4)–1, provides in pertinent part:

> (*a*) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of section 206(4) of the Act, for any investment adviser, directly or indirectly, to publish, circulate or distribute any advertisement:
>
> * * * * * *
>
> (3) which represents, directly or indirectly, that any graph, chart, formula or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula or other device being offered will assist any person in making his own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in such advertisement the limitations thereof and the difficulties with respect to its use; or
>
> (4) which contains any statement to the effect that any report, analysis, or other service will be furnished free or without charge, unless such report, analysis or other service actually is or will be furnished entirely free and without any condition or obligation, directly or indirectly; or
>
> (5) which contains any untrue statement of a material fact, or which is otherwise false or misleading.

[5] Sections 203(d), 204, and 207 of the Act, 15 U.S.C. 80b–3(d), 80b–4, and 80b–7.

its registration application[6] promptly to disclose that Schreiber, who had been found in another Commission proceeding to have aided and abetted the violation of certain provisions of the Investment Advisers Act and of the Securities Exchange Act of 1934, was an employee of the firm,[7] and (2) failing to amend at all to disclose that Stanley Chandler, who had been found a violator in the same prior proceedings as Schreiber, was also associated with the firm (Pet. App. 21–22).

On the basis of its findings that petitioner had violated the antifraud and registration provisions of the Act and considering the prior unlawful conduct of

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[6] Rule 204–1, 17 C.F.R. 275.204–1, provides in pertinent part:

* * * * *

(*b*) *Amendment:* If the information contained in any application for registration filed on Form ADV, in any amendment filed on such form, or in any supplement filed on Form ADV–SUP, becomes inaccurate for any reason, the investment adviser shall promptly file an amendment on Form ADV correcting such information.

(*c*) *Report:* Every supplement and amendment required to be filed by a registered investment adviser under this rule shall constitute a "report" within the meaning of sections 204 and 207 of the Act.

[7] An amendment disclosing that Schreiber was an employee of petitioner was not filed until March 1965, three months after the Commission issued its findings concerning Schreiber's previous violations (Pet. App. 21–22). An amendment was filed in January 1965 to disclose that Schreiber had resigned as an officer, but despite the clear request for such information in the amendment form, this amendment did not disclose that Schreiber was to continue as an employee (see pp. 7–8, *infra*). The hearing examiner found that Schreiber continued to exercise a controlling influence over petitioner after his resignation as an officer (Pet. App. 21 n. 6).

Romanoff and petitioner,[8] the Commission held that it was in the public interest to revoke petitioner's registration as an investment adviser. On petition for review, the Court of Appeals for the Second Circuit affirmed *per curiam*.

ARGUMENT

The decision of the court below is correct, and the petition presents no question warranting further review by this Court.

1. Petitioner contends that the Commission improperly applied the "unsophisticated investor" test to determine whether its advertisements violated the antifraud provisions of the Act (Pet. 7–8). It is clear, however, that the Commission is charged with the responsibility of protecting the naive as well as the expert from deceptive practices. As the Senate Committee on Banking and Currency stated in its Report on the Act:

> The nature of the functions of investment advisers, their increasing widespread activities, their potential influence on security markets and *the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors,* convinces this committee that protec-

[8] Romanoff had been convicted in 1950 in New York of conspiracy, second degree forgery, grand larceny, and concealment of stolen property, and had been disbarred as an attorney in that State. Marketlines had been barred from acting as an investment adviser in Illinois on the basis of findings that, in violation of the State's registration provisions, it had acted as an investment adviser both prior to filing an application for registration and after Romanoff had failed to score a passing grade on the State's investment adviser examination (Pet. App. 27–28).

> tion of investors requires the regulation of investment advisers on a national scale. [Emphasis added.] [9]

When advertisements are obviously aimed at unsophisticated investors, as they were in this case, it is appropriate to judge them by their impact on that segment of the public. See *Ward Laboratories, Inc. v. Federal Trade Commission,* 276 F. 2d 952 (C.A. 2), certiorari denied, 364 U.S. 827. The Commission's holding, moreover, was also based on its findings, which petitioner does not contest, that certain statements in the advertisements were expressly prohibited by the Commission's Rules.[10]

Petitioner also contends that the three-month delay in disclosing its employment of Schreiber was not unreasonable, and that its good faith was demonstrated by the fact that, promptly after Schreiber had been found to have violated the securities laws, it filed an amendment to disclose that he had resigned as an officer (Pet. 5, 8). As the court below found, however, (Pet. App. 13), there was not only a delay in disclosing that Schreiber was an employee, but as a result of the earlier amendment there was actual concealment of his association with the firm. No amendment at all would have been less deceptive than an amendment which disclosed that Schreiber was no

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[9] S. Rep. No. 1775, 76th Cong., 3d Sess., p. 21.

[10] Contrary to petitioner's argument (Pet. 7) that the Commission could not find a fraud violation because it "did not impute any intent by the petitioner to defraud or deceive," it is clear that a finding of intent to defraud is not required to establish a fraud violation under the Act. See *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195.

longer an officer but failed to state that he remained with the firm as an employee. Petitioner's argument that the three-month delay in disclosure constitutes only a minimal reporting violation fails to recognize the "vital importance [of the registration provisions] to the statutory scheme of securities regulations."[11] The delay in disclosure was particularly serious because Marketlines was only a two-man firm in which Schreiber played a major role in preparing the advisory material (R. 51–53). Petitioner's argument that Romanoff was unaware of the disclosure requirement is refuted by the record,[12] and even if true, would be no defense to the violations found. See *Tager* v. *Securities and Exchange Commission,* 344 F. 2d 5, 8 (C.A. 2).[13]

2. The revocation of petitioner's registration as an investment adviser was a proper exercise of the Com-

[11] *Financial Counsellors, Inc.* v. *Securities and Exchange Commission,* 339 F. 2d 196, 197 (C.A. 2), certiorari denied, 381 U.S. 917. Section 203(d) of the Act provides that if the Commission finds it to be in the public interest, it shall deny registration to, suspend, or revoke the registration of an investment adviser if "any person directly or indirectly * * * controlled by such investment adviser" has, *inter alia*, "willfully violated any provisions of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of this title * * *" or "has aided [or] abetted * * * the violation by any other person * * *" of any of these provisions.

[12] The standard amending form signed by Romanoff clearly stated the requirement of disclosing the name of any employee who had been found to have violated the securities laws (R. 408).

[13] Accord, *Gilligan, Will & Co.* v. *Securities and Exchange Commission,* 267 F. 2d 461 (C.A. 2), certiorari denied, 361 U.S. 896; *Gearhart & Otis, Inc.* v. *Securities and Exchange Commission,* 348 F. 2d 798, 802–803 (C.A.D.C.).

mission's discretion.[14] Advertisements of the type used by Marketlines tend to deceive the public and to debase the standards of the investment advisory industry. And the concealment from the Commission of the identity of employees who have previously violated the securities laws impedes enforcement of the Act. Considering these specific violations and also the Illinois bar order against Marketlines and the New York conviction and disbarment of Romanoff,[15] the Commission appropriately determined that it would not be in the public interest for petitioner to continue to be a member of a profession in which it is essential that the highest ethical standards prevail.[16] Contrary to petitioner's argument that the sanction imposed by the Commission was a "cruel and unusual punishment" in violation of the Eighth Amendment,

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[14] *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112–113; *Tager* v. *Securities and Exchange Commission*, 344 F. 2d 5, 8–9 (C.A. 2); *Pierce* v. *Securities and Exchange Commission*, 239 F. 2d 160, 163 (C.A. 9); *Associated Securities Corp.* v. *Securities and Exchange Commission*, 293 F. 2d 738, 741 (C.A. 10).

[15] Petitioner asserts (Pet. 7) that the Commission considered "extraneous evidence," apparently referring to the bar order and conviction. While these factors could not, under Section 203(d) of the Act, serve as an independent basis for denial, suspension or revocation of registration as an investment adviser, the Commission may consider them in determining the appropriate sanction to be imposed "in the public interest." See *In the Matter of Ernest F. Boruski, Jr.*, [1964–1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶77,139 (S.E.C. Sept. 11, 1964) affirmed, *Boruski* v. *Securities and Exchange Commission*, 340 F. 2d 991 (C.A. 2), certiorari denied, 381 U.S. 943, 944; II Loss, *Securities Regulation*, 1303 n. 52 (2d ed. 1961).

[16] *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 186, 191, 193, 194, 201.

it is well recognized that revocation is a remedial action to protect the public and does not constitute punishment.[17]

3. Only one of petitioner's constitutional arguments—that the use of an "unsophisticated investor" test to judge advertising violates the First Amendment—has ever been urged at any prior point in these proceedings. It is clear, however, that the First Amendment does not require the Securities and Exchange Commission, any more than it does the Federal Trade Commission[18] or the Postmaster General[19] to limit the application of the antifraud provisions of its laws to those advertisements which would mislead persons who are knowledgeable in a given field. As this Court stated in *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 189:

> Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. * * * People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. 'Laws are made to protect the trusting as well as the suspicious.'

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[17] See *Berko* v. *Securities and Exchange Commission*, 316 F. 2d 137, 141 (C.A. 2); *Pierce* v. *Securities and Exchange Commission*, 239 F. 2d 160, 163 (C.A. 9).

[18] *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F. 2d 270, 272 (C.A. 2); *E. F. Drew & Co.* v. *Federal Trade Commission*, 235 F. 2d 735, 739–740 (C.A. 2), certiorari denied 352 U.S. 969.

[19] *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 188–190, 191.

Petitioner's remaining constitutional arguments are not properly before this Court, and in any event are without merit.[20]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[20] Petitioner urges (Pet. 6, 7) that it is an abridgement of its rights under the First Amendment to impose a sanction which precludes it from publishing its investment advisory material. But the First Amendment does not restrict Congress' constitutional authority to impose reasonable qualifications of honesty and integrity for participation in a profession which has a substantial effect upon the national securities markets (see Section 201(3) of the Act, 15 U.S.C. 80b–1(3) (Pet App. 31)), and which, as this Court recognized in *Securities and Exchange Commission* v. *Capital Gains Research Bureau Inc.*, *supra* note 16, involves a fiduciary relationship.

Nor is there any merit to petitioner's argument that Congress has empowered the Commission to create antifraud rules without providing reasonable standards. See Section 206(4) of the Act, 15 U.S.C. 80b–6(4), authorizing rules and regulations to "define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." See also *Sunshine Anthracite Co.* v. *Adkins*, 310 U.S. 381, 398.

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